82-5082

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,
Petitioners,

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has jurisdiction to hear an appeal where the only Notice of Appeal filed by the Appellant is deprived of any effect by Fed. R.A.P. 4(a)(4) and a valid Notice of Appeal is not timely filed as required by Fed. R.A.P. 4(a)(1).

2. Whether the Court of Appeals has the power to waive the requirement of Fed. R.A.P. 4(a)(4) that a new Notice of Appeal be filed after resolution of a post trial motion, consistent with the limitations imposed by Fed. R.A.P. 2 and 26(b).

3. If the Court of Appeals has the power to waive the requirements of Fed. R.A.P. 4(a)(4), must an appellant demonstrate good cause in order for the waiver to be granted or may the Court of Appeals shift the burden to an appellee to demonstrate that it will be prejudiced by an appellant's noncompliance with Rule 4(a)(4).

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Robert C. Griggs and Jacqueline M. Griggs respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 2, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 503 F.Supp. 249 (E.D. Pa. 1980) and is also reprinted in the Appendix.

STATEMENT OF SUPREME COURT JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 2, 1982. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1524(1).

RULES OF FEDERAL APPELLATE PROCEDURE INVOLVED

Fed. R.A.P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A

notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R.A.P. 2 provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Fed. R.A.P. 26(b) provides:

> Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Fed. R.A.P. 4(a)(1) provides:

> In a civil case in which an appeal is permitted by law as of right from a district

court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

Petitioners Robert C. Griggs and Jacqueline M. Griggs instituted this action against respondent Provident Consumer Discount Company in the United States District Court for the Eastern District of Pennsylvania on May 21, 1980.[1/] On December 24, 1980, by Memorandum and Order, the District Court entered judgment in petitioners' favor pursuant to Fed. R. Civ. P. 56.(App. B).

1/ The action was brought for violations of the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq. The jurisdiction of the District Court was invoked pursuant to section 130(e) of the Act, 15 U.S.C. §1640(e) and 28 U.S.C. §1337, which provides for jurisdiction over an action arising under any Act of Congress regulating commerce.

On November 5, 1981, after a remand of the case from the United States Court of Appeals for the Third Circuit,[2/] the District Court entered an Order, pursuant to Fed. R. Civ. P. 54(b), directing entry of final judgment upon its prior Orders. On November 12, 1981, respondent filed a timely Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59. On November 19, 1981, while its Rule 59 Motion was still pending, respondent filed the Notice of Appeal which is the subject of this Petition. On November 23, 1981, the District Court denied respondent's Rule 59 Motion and the case proceeded exclusively thereafter in the Court of Appeals.

On December 4, 1981, the Clerk of the Court of Appeals informed counsel by letter that the case had been docketed in the appellate court. In addition, the Clerk's letter notified counsel in bold print of the applicability of Fed. R.A.P. 4(a)(4) in this case.(App. C). Respondent took no action in response to the Clerk's letter.

On February 1, 1982, petitioners filed a Motion to Dismiss respondent's appeal to the Third Circuit for lack of jurisdiction.

2/ Respondent filed a Notice of Appeal to the Third Circuit from the District Court's decision on January 16, 1981. By an Order dated October 2, 1981, the Third Circuit remanded the case to the District Court.

The ground for the Motion was that, under Fed. R.A.P. 4(a)(4), a Notice of Appeal filed during the pendency of a Rule 59 Motion to Alter or Amend Judgment is of no effect and a new Notice of Appeal must be filed within the prescribed time measured from the entry of the Order disposing of the Rule 59 Motion. In the instant case, respondent filed its Notice of Appeal while its Rule 59 Motion was still pending in the District Court and did not file a new Notice of Appeal after the District Court denied the Rule 59 Motion. Petitioners emphasized in the Third Circuit that Rule 4(a)(4) had recently been amended to eliminate any doubt that respondent's Notice of Appeal was ineffective and that a new Notice of Appeal should have been filed.

Petitioners also argued that, if Rule 4(a)(4) could ever be waived, no good cause for such a waiver existed in this case. Here respondent failed to act even though the Clerk of the Third Circuit Court of Appeals specifically notified respondent's counsel of the applicability of Rule 4(a)(4).

On June 2, 1982, the Third Circuit issued an opinion and judgment reversing the judgment of the District Court. (App. A). Despite its recognition of respondent's failure to comply with Fed. R.A.P. 4(a)(4), the Court denied petitioner's Motion to Dismiss. The Court held that appellants who fail to comply with Rule 4(a)(4)

will nonetheless be permitted to proceed on appeal unless the appellee can show prejudice resulting from appellants' noncompliance with Rule 4(a)(4). The Court's entire discussion of the issue consisted of the following footnote in its opinion:

> The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that "[a] notice of appeal filed before the disposition of any of the above motions shall have no effect." Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice... . In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal.

Slip. op. at 3 n.2. (App. A) [citations omitted].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH SEVERAL OTHER COURTS OF APPEALS AS TO THE EXTENT OF FEDERAL APPELLATE JURISDICTION UNDER FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(4)

Federal Rule of Appellate Procedure 4(a)(4), as amended in 1979, provides that a notice of appeal filed during the pendency of a timely motion under Fed. R. Civ. P. 59 "shall have no effect." Despite the clear language of this rule, the Third Circuit Court of Appeals has repeatedly given effect to such a notice of appeal,

holding that such a notice does vest appellate jurisdiction in the appellate court which will be exercised absent a showing of prejudice by the appellee.

This holding places the Third Circuit in square and irreconcilable conflict with three other courts of appeals, which have held that, unless a new and timely notice of appeal is filed after the disposition of a Rule 59 motion, the appellate court has no jurisdiction over an appeal based upon a notice of appeal filed before that disposition.

The Fifth Circuit, in Williams v. Bolger, 633 F.2d 410 (5th Cir. 1980), and later in Beam v. Youens, 664 F.2d 1275 (5th Cir. 1982), was the first court of appeals to specifically address the amendments to Appellate Rule 4(a). That court held that the effect and intent of the amendment was to overrule previous decisions of some courts of appeal, including its own, which had allowed an appeal to proceed based upon a notice of appeal filed while a Rule 59 motion was pending. The court quoted the Notes of the Advisory Committee to the amendment as having "clearly vindicated" those courts which held that not even an "equitable excuse" could save such an appeal. 664 F.2d at 412-13 n.2.

The Sixth Circuit has come to the same conclusion in a number of cases, including Bache Halsey Stuart Shields, Inc. v. Gitre, ___ F.2d___ (6th Cir. 1981). In an unreported slip opinion (avail-

able on LEXIS), that court of appeals also held that Rule 4(a)(4) is jurisdictional and that the lack of prejudice to the appellee did not alter that fact under the rule as amended. The court held that since there was no effective timely notice of appeal, it had no power to waive or extend the requirements of the rule, citing Browder v. Director, Department of Corrections, 434 U.S. 257 (1978).

Lastly, the Tenth Circuit has always taken the position, even before the amendment to Rule 4(a), that a court of appeals has no jurisdiction over an appeal in which there is no timely notice of appeal filed after disposition of a Rule 59 motion. Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979). Certainly, this position can be expected to continue now that it has been "vindicated" by the recent rule amendments.

In addition, several other courts of appeals have strongly indicated that they would hold contrary to the Third Circuit's decision if faced with the issue presented here. The Eleventh Circuit, in United States v. Valdosta-Lowndes County Hospital Authority, 668 F.2d 1177, 1178 n.2 (11th Cir. 1982), made clear that it considered itself bound by the result reached by the Fifth Circuit, which it noted as contrary to the Third Circuit.

The Ninth Circuit, in Calhoun v. United States, 647 F.2d 6, 10 (9th Cir. 1981), in allowing an appeal filed after oral announcement of a trial court's decision on a Rule 59 motion, but before issuance of a written order, stated that only its interpretation of the word "disposition" as including oral announcement of a Rule 59 decision saved the appeal from being "a nullity under Rule 4(a)(4)."

Finally, both the Seventh and Eighth Circuit Courts of Appeals have discussed the amendment to Rule 4(a)(4) in decisions construing Appellate Rule 4(b). In United States v. Moore, 616 F.2d 1030, 1032 n.2 (7th Cir. 1980) cert. denied, 446 U.S. 987 (1980), the Seventh Circuit stated that the amendment was intended to resolve an ambiguity under which some courts had held premature notices of appeal effective in civil cases. In finding a premature notice of appeal effective in a criminal case under Rule 4(b) the court expressly distinguished the civil rule, finding that the "obstacle" created by the new language in Rule 4(a)(4), which would block a civil appeal, was deliberately omitted from Rule 4(b). The Eighth Circuit, in United States v. Jones, 669 F.2d 559, 561 (8th Cir. 1982), indicated that even in a criminal case under the more liberal wording of Rule 4(b), an appeal will be dismissed if the clerk notifies the appellant of the defect in the premature appeal (as occurred in the petitioners' case) and it is not corrected. Such a dismissal in a criminal case, the

court held, would "conform to the provisions of Rule 4(a)(4)" governing civil cases.

Unlike the courts of appeal discussed above, the Third Circuit has refused to recognize the intent of the 1979 amendment to Rule 4(a)(4) and has stubbornly continued to follow the preamendment case law.

The conflict between the decision of the Third Circuit in this case and the decisions of the circuits cited above justifies the grant of certiorari to review the judgment below.

II. THE DECISION BELOW RECREATES THE VERY PROBLEM WHICH THE AMENDMENT TO APPELLATE RULE 4(a) WAS DESIGNED TO ELIMINATE

The decisions of the Third Circuit Court of Appeals in this case and an earlier case serve to defeat the goal of the amendment to Rule 4(a) by once more rendering uncertain the status of an appeal filed during the pendency of a post trial motion. If this petition is not granted, that uncertainty will persist until such time as this Court does address the issue. The Third Circuit, having been made aware of the authority contrary to its decision, has made clear that it will continue in its interpretation holding that Rule 4(a)(4) creates only a waivable nonjurisdictional defect in an otherwise proper appeal.

The Advisory Notes to the amendment to Rule 4(a) explain that the amendment was intended to end the previous split among

the circuits, as to the effect of a premature appeal, which the Third Circuit now continues:

> The amendment would make it clear that [where a notice of appeal is filed prior to disposition of a post trial motion] the appellant should not proceed with the appeal during the pendency of the motion but should file a new notice of appeal after the motion is disposed of. [emphasis added]

As stated in Wright and Miller, Federal Practice and Procedure: Jurisdiction § 3950 (1980 supp.):

> Under this provision, any notice of appeal filed before disposition of such a motion, whether or not the notice was premature, loses its effect, and must be replaced by a new notice after disposition of the motion.

As noted above, a number of other courts of appeals have recognized the intent to make clear that an appeal such as that in this case must be dismissed. Williams v. Bolger, supra; Bache Halsey Stuart Shields, Inc. v. Gitre, supra; United States v. Moore, supra. Unfortunately, the Third Circuit has not recognized this intent, and has continued to follow preamendment case law. Indeed, the instant case represents a further extension of the Third Circuit's previous divergence from the majority view.

The first postamendment case in which the Third Circuit considered Appellate Rule 4(a)(4) was Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3rd Cir. 1981), cert. denied

___ U.S. ___, 102 S. Ct. 390 (1981).[3/] There the court held that Rule 4(a)(4) did not set jurisdictional requirements, and that the court had the power to waive the premature filing under Federal Appellate Rule 2, which requires a showing of good cause by the appellant to excuse a defect.

The Third Circuit moved one step further away from the rule's intent in the matter now presented for review. In its decision below, the court held that the provision providing that the notice of appeal had no effect would be waived as a matter of course unless the appellee could sustain a burden of showing prejudice. Indeed, this interpretation of the rules virtually reads Rule 4(a)(4) out of existence, since it will be almost impossible for an appellee ever to show prejudice from a premature appeal. Moreover, the Third Circuit's focus on the issue of prejudice is inappropriate. The primary purpose of the rule was never to protect appellees; it was rather to avoid the confusion as to jurisdiction and location of the record which results from premature appeals being considered as valid.

Petitioners' case thus raises a number of questions as to the application of the Federal Rules of Appellate Procedure that

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3/ In Tose, the failure to dismiss the appeal had no effect on the ultimate outcome of the case, since the decision of the trial court was affirmed. The petition for certiorari filed by appellants could not, therefore, have questioned the Rule 4(a)(4) ruling of the Court of Appeals.

this Court has never addressed. Among these are:

(1) Does compliance with Federal Rule of Appellate Procedure 4(a)(4) constitute a jurisdictional requirement? This Court has held that the filing of a timely notice of appeal is "mandatory and jurisdictional." Browder v. Director, Department of Corrections, supra. If, under Rule 4(a)(4) the notice of appeal in this case had no effect, then there was no timely notice of appeal and no appellate jurisdiction. The Third Circuit's opinion appears to create an exception to the general rule requiring a timely appeal for a case where a notice of appeal, though deemed to have no effect, has been filed, in that it assumes jurisdiction to decide such a case. This exception has not been recognized by any other court.

(2) Can a defect under Appellate Rule 4(a)(4) be waived under Appellate Rule 2? In Tose, supra, the Third Circuit relied upon Federal Appellate Rule 2 to waive the noneffectiveness of the defendant's notice of appeal ordained by Rule 4(a)(4). The Third Circuit did not address whether it was, in effect, waiving the filing of a timely notice of appeal, an act not permitted under Appellate Rules 2 and 26(b). Nor did it directly address how it had acquired jurisdiction to decide anything more than whether it had jurisdiction. Unless the defendant's appeal, which under Rule 4(a)(4) had no effect, was considered to be a timely

appeal, the appellate court had no jurisdiction to waive any requirement of the rules.

(3) If Appellate Rule 4(a)(4) can be waived, what standard must be met to justify waiver? In petitioners' case, the Third Circuit held that the requirements of Rule 4(a)(4) would be waived unless the appellee could show prejudice resulting from the lack of a proper appeal. This standard cannot be derived from the rules since even Appellate Rule 2 would require the appellant to show good cause for a waiver. As noted above, the requirement that an appellee show prejudice would rarely if ever be met, thus effectively reading out of existence the amendment which deprives a premature appeal of any effect. If the Third Circuit saw fit to hear an appeal in the present case, where its clerk had sent a specific notice to the appellant of the defect in the appeal in time for that defect to be corrected, it is hard to imagine any case where a waiver of the Rule 4(a)(4) requirement of a new notice of appeal would not be granted. There is no justification for the appellant's steadfast disregard in this case for the procedural framework governing all parties in the federal system.

The Third Circuit has stated no persuasive reason why the clear dictates of the rules should be nullified in this manner so contrary to their intent.

Certainly, the decisions of the Third Circuit Court of Appeals stand as a concrete barrier to effectuation of the goals of the drafters of the 1979 amendment--uniformity of practice among the circuits with respect to appeals filed during the pendency of post trial motions. In the Third Circuit thus far, the amendment has made no difference whatsoever in the treatment of such appeals. At this point it is apparent that only a definitive ruling from this Court can achieve the objective of the amendment. That objective of clear guidelines for litigants and the courts, governing all cases in every circuit, can and should be attained, by a grant of certiorari in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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